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N O R T H W E S T E R N
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**Strategies for the USPTO:
Ensuring America's Innovation Future**

Sharon Barner



Strategies for the USPTO: Ensuring America's Innovation Future

SHARON BARNER*

¶1 MR. NARAYEN: Good afternoon, everybody. We are going to kick off our keynote speech here in just a couple of minutes. I hope everybody is enjoying the lunch, and I hope everybody was able to attend the morning session. If you weren't able to attend our morning session on *Bilski*, we are transcribing today's events, and will be publishing today's proceedings in the third issue of our eighth volume.

¶2 Before we get to our keynote speaker, Deputy Sharon Barner of the USPTO, I wanted to welcome Professor Clint Francis, who is going to introduce our keynote speaker. Professor Francis has taught here at Northwestern for a number of years, focusing on intellectual property, commercial law, and e-commerce. He joined Northwestern Law's faculty in 1978. He's received numerous teaching awards, served as a faculty advisor and committee chair of numerous committees at the university. And I would like to especially thank him for being instrumental in this year's symposium. He provided a lot of advice and guidance in setting up today's events. So I will turn it over to Professor Francis.

¶3 PROFESSOR FRANCIS: Distinguished guests, ladies and gentlemen, good afternoon and welcome. It is my pleasure to introduce the Deputy Director, Ms. Sharon Barner. Her formal title is Deputy Under Secretary of Commerce for Intellectual Property and the Deputy Director of the United States Patent and Trademark Office. In this role, she is responsible for guiding formulation of policy regarding the Administration's position on all patents, trademarks, and copyright issues, both domestically and foreign. She's also responsible for helping guide IP policy globally.

¶4 As a leader in the United States Patent and Trademark Office, she's responsible for implementing policies and initiatives to enhance the Agency's delivery of timely and high quality patent and trademark examinations. Prior to joining the United States Patent and Trademark Office, Deputy Director Barner was a leading intellectual property attorney, with 27 years of professional experience. She was a partner with *Foley & Lardner* in Chicago, and chaired the firm's IP Department. Her experience spans patents, trademarks, copyright disputes, and includes technical science fields, such as genetically-engineered foods, computers, and satellites. Deputy Director Barner holds an undergraduate degree from Syracuse University, and a law degree from the University of Michigan. She has written and lectured on various IP topics and has been recognized as a leader in IP by numerous professional organizations. Northwestern Law School has

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* Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the USPTO. In addition to thanking our sponsors, we would like to thank Deputy Director Barner and the USPTO for their efforts in assisting the IP community.

worked closely with the United States Patent and Trademark Office over the last three years. For example, we have co-hosted an Independent Inventors Conference with the United States Patent and Trademark Office. And the Under Secretary of Commerce, the Commissioner of Patents, and the United States Patent and Trademark Office General Counsel have held a town hall meeting at Northwestern, addressing Midwest patent attorneys regarding recent changes in patent law procedures.

¶5 We have also had three sets of senior patent examiners, who have come to the law school and worked with the law school as part of our medical innovation course, which is a course that we teach together, and I teach in, together with Feinberg, the medical school, McCormick Engineering School, and Kellogg, the business school. And the senior patent examiners have been very helpful in assisting students in training for patent research. We very much welcome Deputy Director Barner to Northwestern Law School, and Chicago welcomes her back as well. Thank you very much.

¶6 MS. BARNER: Thank you. And thank you, Professor Francis, for those very kind remarks. I want to thank everyone for being here today. And it's my privilege to be here representing the U.S. Patent and Trademark Office. I have only been in my post for a little less than five months, so I want to spend some time today talking about the challenges that I have seen since I have been there, and what we are doing to combat those challenges and deal with them, and the effort to make a better U.S. Patent and Trademark Office in the very near future.

¶7 So I am going to start by telling you a little bit about why I left the job I love and a city I love to go to the U.S. Patent and Trademark Office and work for the Government. It's because over the years, I have seen that innovation has become more and more a key driver of the economic recovery. And that aspect of having intellectual property play such a key role in what I consider to be fostering innovation in our future as an innovation and technology-based society, to me, meant that we needed to make sure that the agency that is posed with protecting that intellectual property innovation was doing it in a manner that was going to best hold true for the next generation in terms of protecting IP. And given that the U.S. Patent and Trademark Office plays an essential role in fostering innovation, I wanted to make sure that for the generation to come, including my children, that we had an office that was operating in a way that issued timely patents that were of good quality.

¶8 And who better to do that than someone, from my perspective, who's been looking at and working in this area for twenty-five years. So when I got the call about whether I would take this position I, of course, said "no" because I did, indeed, like my job and living in the city of Chicago. But I think that the fact that they did not take "no" for an answer is represented by the fact that I am here today talking to you as a PTO official. Currently, American business sectors that rely most heavily on IP account for nearly \$5 trillion in the gross domestic product and employ 18 million workers. As I said, it's clear that IP will continue to play a critical role in the economic recovery, fueling economic growth and creating jobs. Innovation, science and technology, in particular, are crucial to sustainable growth and to maintaining America's global competitiveness over the long term. One main objective of the patent system, of course, is incentivizing certain conduct, including innovation, development, and commercialization, and disclosure of that so that we can benefit from the innovation in the past.

¶9 Excessive delays in processing patent applications clog innovation and thwart job creation and recovery. Delays place inventors at risk of losing their ideas to copyists at home and abroad, and hamper investment and innovation. Patent applications languish so long that the technology they seek to protect becomes irrelevant. Now, to be fair, there has been a significant surge in patent applications over the last ten years. That has been one factor leading to the backlog at the Patent Office. The number of patent applications filed globally increased from 900,000 in 1996 to 1.6 million in 2006. The increase in patent application filings has been due to a number of factors, including an increase in innovation. Technology itself has provided a means to speed up innovation and move to a more technology-intense society; particularly growth in electrical and computing technology.

¶10 For those of you in this room who are old enough to remember, back in 1995, when industry started getting personal computers in a large way, we have seen a revolution in the use of technology and industry during the past fifteen to twenty years, and we have moved to a more innovation-based society. I don't need to tell you how much manufacturing has moved from the United States, but we have also continued to innovate and use innovation as a way of fueling the economy. I am sure any of you could think of lots of other reasons why we have increased innovation over the last several years and why that has led to increasing application filings. But the concept of the backlog at the Patent Office, i.e., the amount of work we have sitting, waiting for someone to do, is frequently referred to, but not always well-defined. Inherent in the patent process is that there is always work sitting, waiting for someone to process it. So we have to look at the level of work that we have in our inventory and the ability or the capacity to dispose of that work.

¶11 And we have to somehow moderate between the number of applications coming in and our capacity to be able to do the work that we have sitting there. So when I talk about pending applications, I am talking about the inventory that we have sitting there, which has been sitting there for three or four years frequently, plus the new applications we have coming in every day. So we have an inventory that's sitting there, and on average every year, we are getting about 400,000 new applications. We have a current backlog of 750,000 applications; nearly the total applications filed worldwide in 1996. We also have to take into account, as I said, what we receive in a given year, which is about 400,000 applications. Even in 2009, when we had a decrease in applications, it was nearly 400,000. That means that our inventory is about 1.2 million applications that we have to work on. That inventory leads to a thirty-five month pendency period; that is, if you file an application today, chances are that it would not issue or have a final disposal for another thirty-five months. That's too long for innovation to sit at the Patent Office.

¶12 The other concept we frequently talk about is first office action and that is how long will it take, if you filed an application today, for an examiner to pick it up and you get the first office action on that application. That time frame is nearly twenty-five months. In other words, your application would sit for an average of two years before someone would have picked it up and made a first action on what was going to happen with that application. So the large volumes of the patent backlog can interfere with the PTO's main objectives, which are to incentivize innovation and to protect the innovation that folks have come up with. So, of course, this is not news to a lot of you in this room

who have been working with the Patent Office or dealing with the Patent Office for some time. But the challenge I saw as a private lawyer was that we needed to figure out ways to do better than we have done. We have talked about this challenge for over a decade, and we have tried numerous ways to try to attack this challenge.

¶13 And I can tell you from my nearly five months, we have not been successful yet at attacking the challenge. But what is also clear is that we can no longer afford to let the solution of a problem evade us. We can't allow the patent application backlog to clog the wheels of innovation. As our competitiveness in the global marketplace has become more and more important to us, protecting that innovation has also become more and more important. So Director Kappos and I have seen it as our goal to make sure that the PTO, once again, serves the country as the keeper, protector, and incentivizer of the ideas and innovation that will put Americans to work and fuel prosperity. So how do we think we are going to succeed where others have failed? One of the things we had to do as we embarked on the Patent Office was to take a look at the current strategic plan of the Patent Office. And some of you may recall that in 2007, Congress mandated, as part of the performance-based agency, that the Patent Office create a strategic plan—a five-year strategic plan—that was to go from 2007 to 2012.

¶14 Well, they also mandated that in three years, that the Patent Office pick that strategic plan up, take a look at it, see if it was succeeding, and make any additional modifications that were needed in an effort to make it a success. This is the third year of the 2007 strategic plan. Clearly what we found is that the process of reforming the Patent and Trademark Office and reaching our goal will be very hard work. And even as we looked at the current strategic plan, we recognized that we cannot do it without the help of our stakeholder community. We need your contributions. We will need your feedback, and we will need your help, because the application process is a two-party system. We have to do our part, and the applicant community has to help us by doing their part.

¶15 So I am going to talk a little bit about what our part is, as we talk about initiating and going through the strategic plan. The first thing we looked at was: were the big goals that were set out in the strategic plan being achieved? And those big goals had to do with things like quality and pendency—two of the goals that remain and we have to this day. It had to do with our IT infrastructure, and it had to do with our IP positioning where we were policy consultants on both domestic and global IP policy issues. I have time to talk about only one of those today, because I want to have some question-and-answer series.

¶16 But if you take a look at the FY 2011 budget, the President's budget, we actually went through the process of revamping the strategic plan in an effort to make it part of the 2011 budget, as well as part of what we are doing today. In the 2011 budget, we decided that those four big buckets were too big, because it was hard to measure and manage buckets that were that big of what our goals and activities needed to be. So we broke those four big buckets down into seven smaller buckets. The goals being to reduce the pendency and backlog—that's always our number one priority—improve the quality of the examination, improve and enhance the patent appeal and post grant processes, which, of course, are part and parcel of the application and patent validity route, demonstrate global leadership in all aspects of IP policy development, improve our IT infrastructure and tools, secure a sustainable funding model, and improve our relations with employees and stakeholders. After meeting with all of the business unit heads, we

decided that a strategic plan does you no good if you simply adopt it because Congress says you have to, put it on a shelf, and go about doing what you have been doing for the last five years. That's not what we call implementing a strategic plan.

¶17 And one of the things that the business unit heads from the Patent Office were quite clear on is that was what had been happening: we would do the priorities when we finished doing the other things we have always done. So we had to make the strategic plan part and parcel of their performance goals. One of the first things we had to do was change their contracts in a way that they understood that reaching these goals were part of their performance values. As you know, in private industry, people always say, if it doesn't get measured, it doesn't get done. So it was clear that unless the leadership understood that it was part of their performance goal to make the strategic goals work, we weren't going to get them to focus on what those goals were. Getting to the performance on quality and backlog—I am going to talk about backlog in some detail as opposed to all of the other seven, because we just wouldn't have time. One of the things we needed to do was make people look at it in a different manner; in a manner which broke down the hundreds of activities that would go into something like improving your backlog. When we peeled back the onion on backlog and pendency, one of the first things we saw was that there were some key things that moved the lever on backlog and pendency. One was increasing examination firepower, we will call it.

¶18 And that includes hiring and overtime, and some other things you might do with the examination capacity. Another one was increasing efficiencies at the Patent Office, and the third was the IT infrastructure itself. So we wanted to then take these three levers that impact backlog and pendency, and then peel back the onion layer even more on those three things. So the first thing we looked at was hiring, because typical of the past, the Patent Office's first response to “We have too much work” is “Let's hire some more people.” And while hiring is clearly a part of solving the problem, it is not the only method of solving the problem, or necessarily even the best one. At the Patent Office, looking at the historical data, over the past three years, the Patent Office has had 100% access to its fees, and has hired nearly 1,200 examiners a year. And by 2009, there had been a significant increase in the number of examiners hired by the Patent and Trademark Office. But another thing was happening; they were losing examiners at the rate of about 8% per year. That meant that for every 1,200 you hired, four or five hundred were walking out the door every year. So your net increase was not keeping pace with what you thought the capacity needed to be to examine the applications. We wanted to look at hiring in a more strategic way, so we had to peel back the layer yet again. Why were our new hires leaving, and how do we go about getting new hires that we will keep longer?

¶19 We looked at what were the demographics of the people we were hiring to come into the office during that three-year period. What we found is that we have some very highly-skilled people coming into the office, and those highly-skilled people were, many times, on their first job or perhaps their second. The average age of those highly-skilled individuals was about twenty-seven or twenty-eight years old. And they didn't necessarily find anything wrong with the Patent Office, but that was just their first docking point. So they would stop at the Patent Office for up to one to three years, and then they would go on to their next job. It's not much different than you have in private industry. The difference for us at the Patent Office is that you have to train the examiners when they come in. You have to train them in how the process works. Many of them are

not lawyers. You have to train them to do an analytical process of examining applications.

¶20 So when you look at the fact that we spend, just on the training alone—we broke it down—nearly \$150,000 per examiner coming in—and that doesn't include overhead or salaries or anything like that—it was very important to start looking at that hiring demographic to see if you did a few things different, what could happen to your hiring demographic. What that led us to do—and if any of you have looked at the site or looked at the blogs recently—was to look for hiring in a couple of areas. We looked at hiring experienced IP professionals. Those are folks who were either former examiners or IP lawyers who were at law firms who were, kind of, sick of that rat race and wanted to come and find a stable job, with nice flexibility, and they could work from home, and maybe even some who had been at one or two jobs. This wasn't going to be their first stop. They had a much better idea and perspective on what working was like. And so we set out this year, when we put out our hiring notice, to hire those IP experienced practitioners in the first instance. Interestingly enough, when I talk about peeling back the layers, when we put our first postings on, we got, probably, maybe, 700 responses, 800 responses. We didn't think that was enough. So by managing in real time, as we saw those things coming in, we then sent out a new set of requests for applications.

¶21 We wrote letters to everyone who had a registration number in the D.C. metropolitan area, and asked them to apply, to come over, and have an exciting job at the USPTO. And that day, we got 3,000 hits on the site. So when I talk about managing to a strategic plan, I am talking about managing in real time in that way. You can't go off and do something else. You just have to keep managing the process along the way so that you get the change that you need, which is one of the things that was clear was not happening. We would collect data, hiring data, for example, attrition data, for example. And it was a nice collection of data. No one ever used it to manage. So one of the things we sought to do differently first was to go through this experienced IP hiring. The goal was to get people who could produce sooner, which would mean that we could cut that backlog down sooner, and that's why it was important for us.

¶22 Here is the other reason why it was important: when we do new hires, we have an eight-month in-class training program for them. So it is a minimum of six to seven months before people are actually in the production area as an examiner. With experienced IP hires, the other thing we looked at is, we don't need as much training time. So we created a new program for the experienced IP hires that cut down the eight-month training program to four weeks and an apprentice program. So you won't be thrown in with examiners who have been working for four or five years. You will have an apprenticeship program in which you study for four weeks, you start processing and looking at applications. You have some class time along the way. You won't be in an academy for six months before you actually get to work on processing applications. Again, critical to us as we looked at working down our backlog was getting people actually working sooner.

¶23 The other thing we looked at was that without fail, 100% of the examiners said eight months was too long to be in a training academy for purposes of doing the application work. So that also led us to create a new scaled-down program for new hires, who didn't have IP experience. So looking at the data and looking at the information, just in a management way, led us to a number of things to do differently just on hiring, for

example. Well, the second part of that hiring aspect was attrition. As I said, as an agency, we can't afford to lose 8% of our hires in a given year, because, unlike other government agencies—that's about the same number as other government agencies lose people, but other government agencies don't have the kinds of highly-skilled people that we need and have to train over a period of time.

¶24 We found out a couple of things about that attrition. One, if we could keep people through their third year, 85% of them stayed. So it was that one to three-year period that was very critical to us in terms of attrition. So we needed to focus more on examiners and that one to three-year period to try to keep them. And, because we had a limit based on our budget on what we could hire this year, we really needed to focus on not having an 8% attrition this year. And so we meet every bi-week on how we are doing on attrition. Who is at risk? What do we need to do to save them?

¶25 We have a number of at-risk categories. Every business needs some attrition; people who just aren't going to cut it, people who are doing things that will get you in criminal trouble. And so some attrition is necessary. We understand that. We are not trying to keep people we should get rid of. First, we are trying to keep people who could go anywhere and we would like them to stay in the Patent Office. Second, we are trying to keep people who are just shy of their production numbers, and we may need to do some additional help to get them to that 95% production level.

¶26 So our goal was to create a few programs to identify those people early. You just can't focus on the problems. You also have to focus on your successes to keep them; to focus on those two groups in particular so that we had a better success rate of keeping them, and lower our attrition rate. And although it's hard for the Patent Office to stomach, we actually created some numbers that we wanted to manage, too. You know, at the Patent Office, having a number and a metric has seemed to be a dirty word, okay. "You can't do that because the Union won't let you," or, "You can't do this; you will discourage people." Well, if you don't put a real target out there, you can't manage to it.

¶27 So in a year, for example, where you normally have 450 attritions, why can't you try to manage to 300? You can't tell me that 450 of those people were people who were all going to leave because they were problems. So if you have people who are leaving who are not problems, you need to be able to try to manage to keep those people. So we have spent the last several months coming up with best practices lists in order to identify people who are at risk of leaving, a flight risk, I call them, who we would like to keep. And then we spend time with these people. We actually talk to them about career opportunities at the Patent Office. You know, you don't have to examine for the rest of your life. There are other opportunities at the Patent Office to succeed and to go up the ladder and do other things. So some people leave because they think it's a dead-end job. Some people think it's monotonous. I was talking to somebody at breakfast who said it's very isolating.

¶28 So we have been talking about things like examining in pairs or examining in groups; something that would get people to have more interaction with each other so that those people who are more social would actually stay. So those are two issues, from a perspective of dealing with a backlog and pendency, where we looked at what would not be abnormal in a business setting, but seemed to be like a bolt of lightning at the government to actually manage and measure the things that were managed. And we have hundreds of those things on almost every one of the seven priorities that I listed to you.

¶29 Well, you can't manage and change things in real time if we don't take a look at what's going on with a given activity and figure out how to change it so that it's workable. The other big thing that we are working on is a nationwide workforce. We know that there is no reason you have to be in Alexandria to process patent applications. Certainly, there are training issues that we have to deal with. There are connectivity issues we have to deal with. There are infrastructures we have to deal with. But once you decide that we are going to have a nationwide workforce, then you start dealing with the problems that are associated with having a nationwide workforce. So our goal is that we will have a nationwide workforce.

¶30 We will have lots of Union issues to work through. We will have lots of IT infrastructure issues to work through, but we are confident that by having the ability to tap people across the country who don't have to move to Alexandria to stay with the Patent Office and examine patents, we will get a much richer workforce overall, a much more dynamic workforce who stays with us longer, and that will help us attack this problem, and keep it at a level that is reasonable in terms of the wait times for having applications reviewed and having patents issued by the Office.

¶31 I would love to talk to you about the intricate details of every other topic, but I wanted to leave some time for questions and answers. The last thing I would like to say is that I have talked to the Dean about the possibility of rolling out the strategic plan here. One of the things we are required to do by Congress is, as we put together what will be our revised aspect of the strategic plan, to roll it out to our constituency, and to get input and feedback on that before we finalize it and submit it to Congress in late June or early July. So I would be very happy to come back with more details of the plan and something you could actually hold and look at before I come, to have questions on, to help us make this a more dynamic plan that really does get the Patent Office that we think is critical for continuing to have our innovation be a leader in this country on the economy basis. Thank you. And I will now open it up for questions.

¶32 AN AUDIENCE MEMBER: One thing that I think would help with the pendency is if the examiners actually looked at the documents that the lawyers send in. I have two cases where we have sent information in, we got the same response each time back from the examiner, and it was obvious he didn't even pay any attention to what we sent. We went to the Board of Appeals, who overturned the examiner, and we got it. We have over 1700 days adjustment on the patent. So that means that the PTO held it up for almost six years. So that doesn't help for innovation.

¶33 MS. BARNER: Agreed. So a couple things we are trying to do to address issues just as you mentioned. One of the things we are thinking about is what I will call, sort of,

the Magistrates Program. And it is sort of a program by which we get skilled professionals to come in and mediate at a much earlier time frame when there is a dispute or someone is not doing what they should do in terms of an application. You know, you file a notice of appeal—and this was news to me—you file a notice of appeal when you have gotten your second final rejection, and then it sits, right. And it's not on the Patent Office's docket in terms of the days that are being added, and it's not on the Board of Patent Appeals docket, because they don't get the case until it's fully briefed. So in the sitting time, which could take years, nothing happens. So we think that if we could get someone in there earlier who is a broker, either the supervising examiner, or what we will call the magistrate examiner, to talk to the people and see if you can't find reliable subject matter of where the issues that are ships passing in the night, to get it resolved. It's going to get resolved two or three years down the road. Why not get it resolved earlier?

¶34 AN AUDIENCE MEMBER: One problem, though, that exists is, we had a conversation with the examiner and the supervisor on the phone. In there, it was agreed as to what we would do with the application to get it in an allowable condition. We made those changes, submitted them, and got back nothing. What's the purpose of having those phone calls if you can't come up with something and have the Patent Office stand behind what they had agreed to?

¶35 MS. BARNER: Absolutely. I can't disagree with that—you are absolutely right. You may have seen in the Federal Register, we did a pilot omnibus program where if you are having a problem with an examiner or anyone else at the Patent Office, the goal of the omnibus program is to resolve your problem within 48 to 72 hours. And they are being measured on the ability to resolve issues and get back to folks in that time frame. So, hopefully one of those programs will stop things like that from occurring.

¶36 AN AUDIENCE MEMBER: First off, I just want to say I have been in practice more than 15 years, and this is the most intelligent discussion about addressing attrition that I have ever heard, and I want to commend you for that. It's very sensible. It's got good economic principles behind it, and I am really pleased to hear that. Slightly, on a different note, Congress passed patent term adjustment, and in there, they created benchmarks for the Patent Office, for timeliness, about taking care of office actions first—first parts of examination, et cetera. Do you think those benchmarks are valid today?

¶37 MS. BARNER: Well, I can't tell you that I am familiar with all of the benchmarks set by Congress. But what I can tell you is that if no one is in there measuring them, and whether the Patent Office is actually complying with them, they are just like those strategic plans I told you got done and put on a shelf. If you are going to create benchmarks, you have to be measured to them, and you then have to figure out what's going on that you can't reach the benchmark. Lots of things can happen that create a problem for reaching a benchmark in any given year. This year, for example, instead of having \$130 million we thought we were going to have, we don't have it, so we can't hire in the way we would like to. But whether you reach the benchmark or not in a given year, to me, is part of the question, but not necessarily part of the solution. Why didn't you reach it, and what are you going to do to make sure it is reached? I can't imagine we are reaching a benchmark when I saw that we lengthened the pendency time over the last year, and we lengthened the time of the first office action over the last year. So I would

be hard-pressed to believe we are meeting a benchmark that was set by Congress to reduce those numbers.

¶38 AN AUDIENCE MEMBER: Just for example, first step of examination, 14 months, and you mentioned twenty-five months. I know, clearly, that's not being met. But I was just wondering, those numbers—I understand you may not be familiar with them specifically.

¶39 MS. BARNER: Clearly, it's not being met, and it's clearly our job to do something about it.

¶40 AN AUDIENCE MEMBER: Could you say something about the metrics and procedures you are adopting to assess the quality of the examination?

¶41 MS. BARNER: Yes. That's a hard one. So right now we have a federal registered notice to take input from the applicants and people who use the Patent Office on what their aspect of quality is. Because for as many people that are out there, we probably have as many opinions on what quality is. So the first thing we thought we should do is go out and see what the people who were using the Patent Office believe we should measure to in terms of quality.

¶42 So we are actually going to do this in a manner that I think is probably the most productive, and that is, we are going to see what the input is. I think that the close of that input may be in two weeks. We then have hired a chief economist who is going to help us take that information, and try to come up with either a measure or a manner in which we can then come up with some aspect of measurement that everyone can agree on. The problem we have is that, again, people don't agree on what quality is. But what we know as leadership is that increasing production without a commitment to increasing quality will do us no good. So we are trying to focus on both sides of that coin at the same time. So we are taking information and input on that. We will see what we come up with. The key, to me, is something that is actually measurable in a manner that everybody believes makes sense.

¶43 There are studies out there that take quality and measure them by litigation. We know only a small percentage of patents go to litigation, so I don't think that's a valid measurement perspective. You can't necessarily measure it by the licensing that's going on. So we have to figure out what is the best quality measure for patent applications. And everybody in this room, if you go to the USPTO website, there is an opportunity to comment on what you think it should be.

¶44 AN AUDIENCE MEMBER: Have you looked at what the European and Japanese Patent Offices do with respect to pendency and quality of these other measures?

¶45 MS. BARNER: We have. You know, we have a number of initiatives going on with the Japanese and the Europeans in particular on pendency and backlog and quality. And the key thing, to me, is getting behind the numbers of what they put out versus what happens. Now, one of the things that goes on in Europe, for example, is they will in many cases review the applications filed in Europe first. And we can go to that system. We are looking at applicant-determined acceleration periods. So it's one of the things we are also looking at. There isn't anything right now that's off the table.

¶46 So we are looking at what they do, and we are hoping that while we can benefit from some of the good things they have, we will have taken care of the first office action by 2013, and pendency by 2014. We are looking at work sharing with PPH and PCT as a method of helping us clean up the backlog and keeping it cleaned up as part of that. I

spent some time with the EPO and the JPO just recently, looking at how we could further promote work sharing as a part of that. So, yes, we are looking at everything we can to make this realistic and something that is sustainable. It won't do us any good if we reach our goal by 2014, and then have it slip back to where it is right now over the next couple years. We need to implement measures that we can continue to follow to keep the backlog where we need it.

¶47 AN AUDIENCE MEMBER: Along those lines, is there any provision being made for the proposed protest provision of the patent format so that you have some sort of workforce that's built in now to handle the post-issuance protest period, which I imagine will not be substantial.

¶48 MS. BARNER: We are looking at what we will need to do with the post-grant opposition, should that issue pass. As you know, we have a couple years to implement that, in which we would be staffing that. But, yes, we are looking at that. My considered opinion is that the Board of Patent Appeals alone could not handle it, given their own backlog, in terms of what's coming to them between appeals and ex parte reexamination. So we will be looking at how we will handle that aspect of it. It's certainly on my radar to deal with how we deal with post-grant opposition.

¶49 AN AUDIENCE MEMBER: As someone who's about to enter practice, is there anything that we can do on our end to make things go more smoothly or easier? Is there anything that you see being done that is helpful?

¶50 MS. BARNER: When you heard me say that the application process is a two-part process, we have to do our job. We have to do a better job of examining applications, of getting to the final resolutions. The examiner and the applicant may not always agree, but we have to do better at that end quality. I think that, having been one for most of my career, the external folks who are dealing with the Patent Office, also have to be more efficient and give us better quality work. So what we have seen a lot of recently is that there are a lot of people, are submitting items that would not stand up to the quality measurement of a lot of the folks who are in this room. So we are also cognizant that we need to make sure we are teaching folks who are filing things with the Office how to do it better.

¶51 There are lots of tutorial programs on our website, for example, but you have to have the same measure of quality when you turn things into the Patent Office that you would to one of your partners in the law firm or elsewhere. This is what we need from the participants: Not to game the system or create filings for purposes of keeping us at work; just to treat the system in a manner that looks at the efficiency levels of examiners who have the dual job of looking at the substantive issues and dealing with the papers that are coming in.

¶52 On that, I just want to thank everyone again for inviting me, and I look forward to speaking with you again in the future.